

JESSE H. JOHNSON

IBLA 88-418

Decided January 19, 1990

Appeal from a decision of the Redding Resource Area Manager, Bureau of Land Management, adjusting the annual rental for road right-of-way CA-10928.

Appeal dismissed and case remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals--Rules of Practice: Appeals: Dismissal

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

APPEARANCES: Jesse H. Johnson, Redding, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Jesse H. Johnson has appealed from a decision dated April 1, 1988, by the Redding Resource Area Manager, California, Bureau of Land Management (BLM), adjusting the annual rental for road right-of-way CA-10928. BLM granted the right-of-way to Johnson on February 24, 1983, pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), for use and maintenance of an existing road over public land in Shasta County, California, providing access to Johnson's private land.

In a letter dated February 16, 1983, the Area Manager forwarded the proposed right-of-way to Johnson, explaining as follows:

Please show your concurrence by signing both the original and duplicate of the proposed grant in the space provided, and return them to this office.

The estimated annual rental, to be paid in advance, has been determined to be \$250.00 per year. Upon receipt of an approved fair market value appraisal, the advance rental shall be adjusted accordingly.

Johnson signed the right-of-way forms and returned them to BLM, along with the \$250. Thereafter, BLM issued the right-of-way.

In a letter to BLM dated July 14, 1985, Johnson stated that BLM had indicated in its February 16, 1983, letter that \$250 was the estimated annual rental; he complained that such a rental was much too high; and he requested that "the charges on my right-of-way be reevaluated and appropriately adjusted." There is no indication in the record of a response by BLM to that letter.

On October 15, 1986, Johnson filed a "protest" with BLM alleging that the \$250 annual rental was excessive. He noted that he had not received any notice that a fair market appraisal had been conducted. He cited to proposed regulations regarding linear rights-of-way and again requested that his rental be adjusted downward. By decision dated October 29, 1986, BLM dismissed Johnson's "protest," stating:

At the time of issuance of the right-of-way grant and pursuant to 43 CFR 2803.1-2(b) an "estimated" annual rental of \$250.00 was collected.

After issuance of Right-of-Way Grant CA 10928, BLM field offices received guidance relating to rental payments for rights-of-way in Instruction Memo 84-490, Change 1 dated November 28, 1984. The guidance, as stated in Item No. 2 in the third paragraph of the memo, reads as follows:

Existing rights-of-way subject to readjustment will be continued at the original rental fee or last uncontested rental fee. Again, the rental payment is subject to review and revision after the new regulations are established.

In dismissing the protest, BLM declined to take any action on Johnson's request, concluding that any action would have to await the finalization of the linear right-of-way regulations.

On April 1, 1988, BLM issued the decision which is the subject of the present appeal. In that decision, BLM stated that it had reviewed Johnson's rental in accordance with 43 CFR 2803.1-2 and the rental schedule set forth therein and determined that the new rental should be \$56 per year. ^{1/} BLM's decision established a 5-year billing cycle based on the calendar year, applied appellant's February 1988 payment of \$250 to cover rental due through December 31, 1992, and allowed appellant 30 days from receipt of the decision to remit \$23, the remainder due on the 5-year cycle. The decision made no mention of rental monies paid for years 1983-1987.

^{1/} Under regulations effective Aug. 7, 1987, subject to certain exceptions, annual rentals for linear rights-of-way are to be determined in accordance with a "per acre rental fee zone value schedule." 43 CFR 2803.1-2(c)(1)(i). The rental for right-of-way CA 10928 was so determined.

Johnson forwarded the \$23 to complete payment for the 5-year billing cycle and also filed this appeal. He agrees with all of the actions taken by BLM in its decision; his complaint is that BLM failed to readjust the rental back to the 1983 date of his right-of-way grant. Johnson charges that when BLM issued the grant the rental charged was an "estimate" and that his rental was to be established finally by a fair market appraisal. He argues that no appraisal was ever conducted and that, therefore, the promulgation of the linear right-of-way regulations constituted the first actual fair market value appraisal. He concludes by requesting that each separate year's estimated rental prior to 1988 be adjusted and the excess over \$56 for each year either be refunded to him or credited against future billings.

[1] It is well established that the failure on appeal to point out affirmatively why the decision appealed from is in error may be treated in the same manner as an appeal in which no statement of reasons has been filed, and the appeal may be dismissed. Andre C. Capella, 94 IBLA 181 (1986); Don G. Carpenter, 94 IBLA 7 (1986); United States v. De Fisher, 92 IBLA 226 (1986). In this case, appellant concurs in BLM's decision. He does not disagree with the established rental. Rather than pointing to error in the action taken, he asserts error because BLM failed to do something that he believes should have been done. That is not a sufficient reason to support an appeal of BLM's decision, and, therefore, his appeal is subject to dismissal.

The appeal is also subject to dismissal for an additional reason. Under 43 CFR 4.410, standing to appeal to the Board is limited to a party to a case who is adversely affected by the decision being appealed. Johnson's complaint is that BLM did not adjust his rental for the years prior to 1988. However, we cannot conclude that BLM's decision constitutes a refusal to adjust the rental for such years. Therefore, appellant was not adversely affected by BLM's decision and his appeal may be dismissed. See Mark S. Altman, 93 IBLA 265 (1986); Hal V. Carlson, Jr., 62 IBLA 305 (1982).

Since we conclude that BLM's decision did not address the issue raised by Johnson, if we were to consider it, we would be in the position of rendering an advisory opinion. Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed. Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 274 (1987).

Under the circumstances, Johnson shall have 30 days from receipt of this decision in which to furnish BLM with any additional information in support of his request for an adjustment of rental for the years prior to 1988. BLM should address Johnson's request by decision, setting forth therein the rationale for its action. If that decision is adverse to Johnson, he may pursue an appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed and the case file remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge